FILED
NOV 21 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 494

MARINE TRANSPORT LINES, INC., and MARINE NAVIGATION COMPANY, INC., *Petitioners,*

v.

UNITED STATES OF AMERICA.

PACIFIC FAR EAST LINE, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA.

On Petition for Writs of Certiorari to the United States Court of Claims

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

J. FRANKLIN FORT,
529 Tower Building,
Washington 5, D. C.,
Counsel for Petitioners.

KOMINERS & FORT,
ISRAEL CONVISSER,
Of Counsel.

November 21, 1956

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

Table of Contents

	Page
I. Points Discussed in Petition	2
II. 28 U.S.C. 1500 Does Not Bar Jurisdiction of the Court of Claims Or of This Court	6
The purpose of the statute	6
The legislative intent to effect no change in section 260	8
Section 1500 should be construed so as to effectuate the legislative purpose	11
III. Conclusion	13

Appendix B

Excerpts from Government's Charter Accounting Regulations	1b
Excerpts from Government's Charter Accounting Instructions	1b
28 U.S.C. 260 (Prior to 1948 Revision)	3b
Excerpts from Legislative History of 1948 Revision of Title 28	3b

Table of Cases Cited

Adamowski v. Bard, 193 F.2d 578, 581 (C.A. 3, 1952), cert. den., 343 U.S. 906	10
Affronti v. United States, 350 U.S. 79 (1955)	10
American Eastern Corporation v. United States, 133 F. Supp. 11, aff'd., 231 F.2d 664, cert. den., 351 U.S. 983	2, 3
Ann Arbor Tp. v. United States, 93 F. Supp. 341 (D.C. E.D. Mich., 1950)	8
Cox v. Roth, 348 U.S. 207, 209 (1955)	12
Gulf Research & Dev. Co. v. Schlumberger Well Sur. Corp., 92 F. Supp. 16, 18 (D.C. S.D. Cal., 1950), mandamus den., 185 F.2d 457	11, 12

Page

Hedger Transp. Corp. v. Bushey, 155 F.2d 321 (C.A. 2, 1946), cert. den., 329 U.S. 735 3
Kline v. Burke Construction Co., 260 U.S. 226 (1922) 6
Markham v. Cabell, 326 U.S. 404, 409 (1945) 11
Martin v. Wheatley, 62 F. Supp. 104 (D.C. W.D. Ark., 1945) 6
Matson Navigation Co. v. United States, 284 U.S. 352 .....2, 7, 8
Morris v. Sun Oil Co., 88 F. Supp. 529, 530-531 (D.C. Md., 1950) 11
McClellan v. Carland, 217 U.S. 268 (1909)..... 6
Paluchowska v. United States Lines Co., Inc., 93 F. Supp. 751 (D.C. S.D. N.Y., 1950) 6
Powell v. Utz, 87 F. Supp. 811, 816 (D.C. E.D. Wash., 1949) 11
Ruth v. Eagle-Picher Company, 225 F.2d 572, 575 (C.A. 10, 1955) 11
Smythe v. Fiske, 90 U.S. 47 (1874) 11
Stanton v. Embry, 93 U.S. 983 (1875) 6
Sword Line, Inc. v. United States, 351 U.S. 976..... 3
United States v. National City Lines, 337 U.S. 78 (1948) 9
United States v. Ryder, 110 U.S. 308, 312 (1883)..... 11
Vanderwater v. Mills, 19 How. 82 (1856) 3

STATUTES CITED

Suits in Admiralty Act 2, 3
28 U.S.C. 260 (prior to 1948 revision) 6
28 U.S.C. 1359, 1493 9
28 U.S.C. 1500 .....1, 2, 6, 10, 11, 12

IN THE

Supreme Court of the United States

October Term, 1956

No. 494

MARINE TRANSPORT LINES, INC., and MARINE NAVIGATION COMPANY, INC., *Petitioners,*

v.

UNITED STATES OF AMERICA.

PACIFIC FAR EAST LINE, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA.

On Petition for Writs of Certiorari to the United States Court of Claims

---

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

The brief in opposition to certiorari presents a further persuasive reason for the granting of the writs. The Government relies upon 28 U.S.C. 1500 as a bar

to jurisdiction of the Court of Claims and of this Court. This poses the important question of whether an inadvertent change in language, resulting from the 1948 revision of Title 28, was intended to overrule the decision of this Court in *Matson Navigation Co.* v. *United States,* 284 U.S. 352. So far as our research discloses, this question has not heretofore been presented to this or any other Court.

Before addressing ourselves to the issue of section 1500, we discuss briefly the Government's other arguments.

I. POINTS DISCUSSED IN PETITION

1. The Government does not dispute two basic points discussed at pages 11-17 of our petition that (a) there is no jurisdiction in admiralty either *in personam* or *in rem* absent a specific identifiable vessel, and (b) there is no jurisdiction under the Suits in Admiralty Act where there could not have been a libel *in rem.*

2. The point that a suit for an accounting of profits is not within the jurisdiction of admiralty (see pages 9-11 of our petition) was not briefed in the petition for certiorari in *American Eastern Corporation* v. *United States,* 133 F. Supp. 11, aff'd., 231 F. 2d 664, certiorari denied, 351 U.S. 983. The point there urged was that the cause of action was founded upon statute and therefore was within the jurisdiction of the Court of Claims (see petition, pages 7-13, No. 934, October Term, 1955).

The Government argues that the instant suits for an accounting are, in substance, "for the return of improperly collected charter hire" (brief in opp., page 8), and therefore within the jurisdiction of admiralty. But this argument was made in the cases cited in our

petition (see, e.g., *Vanderwater* v. *Mills,* (1856) 19 How. 82). For an accounting suit always is, in substance, one for the recovery of money, as it was in those cases, and their holdings are a refutation of the argument. The cases cited by the Government are not controlling since in those cases the point was not discussed by the Court nor even briefed by the parties. We submit that precedents should not be overridden nor admiralty jurisdiction enlarged *sub silentio,* without benefit of briefs or argument.

The Government's reference to Admiralty Rules 43 and 43½ is irrelevant. These rules provide for references to commissioners or assessors. While the many things that may be referred may include the determination of a balance of an account, it does not follow that admiralty has jurisdiction of a suit for an accounting. As pointed out in *Hedger Transp. Corp.* v. *Bushey,* 155 F. 2d 321 (C.A. 2, 1946), certiorari denied, 329 U.S. 735, once admiralty has jurisdiction, that jurisdiction will not be divested because an accounting becomes incidentally necessary.

3. Absent an identifiable vessel, there is no general jurisdiction in admiralty; absent an identifiable vessel which might have been libeled *in rem,* there is no jurisdiction under the Suits in Admiralty Act.

Without controverting these propositions, the Government asserts that the cases so holding have been overruled by *Sword Line, Inc.* v. *United States,* 351 U.S. 976 (brief in opp., page 8). But again it must be pointed out that these questions were neither discussed by the court nor briefed by the parties either in the *Sword* case or in *American Eastern Corporation* v. *United States, supra.*

The Government's assertion that "[p]roper auditing methods certainly can allocate the amount of overcharge, if any, to any specific vessel", is based upon the superficially plausible assumption that the figures in an accounting, submitted in accordance with the Government's regulations, covering the operations of a number of vessels as a group, can somehow be rearranged to show how much of a total overpayment is attributable to each vessel. It is impossible, within the limitations of this brief, to discuss the various possible ways of attempting to make the allocations and to show why any such allocation would have to rest on purely arbitrary and unrealistic assumptions.

Operations under the charters here involved continued for a number of years. The charters covered groups of vessels. During the course of operations some vessels were returned to the Government and other vessels were added to the charter fleets. Periodically each petitioner submitted a tentative accounting. Some vessels may have made profits, others may have suffered losses. This would not be shown in the accounting. The accounting would show only the total income of the group of vessels less the total expenses of the group, including overhead.

The Government does not show, nor do we think it can be shown, how to identify the specific vessel on which an overpayment of charter hire was made where there was a mingling or offsetting of profits and losses among the vessels in the group. During any given year there may have been vessels that were not under charter in some other year. Some of the vessels that were under charter in one year were not under charter in another year. Vessels that had made a profit in one year may have suffered a loss the next year. Ves-

sels that had operated at a loss in one year might make a profit the second year. Obviously it is not possible to make proper allocation to each vessel of its share of any overpayment unless some arbitrary formula is adopted inconsistent with the regulations of Maritime.

The Government's suggestion that the difficulty in allocation stems from the "way petitioners keep their books" is likewise unsupported and unwarranted. The Government told petitioners how to keep their books. At pages 1b-2b of Appendix B are excerpts from the Government's accounting regulations and instructions showing that accountings were required to be prepared on the basis of fleet, and not individual vessel, operations.

In any event, the charters were fleet charters and the group accounting was required by the Government. Even if some arbitrary allocation of overpayments to specific vessels were acceptable, it would still not alter the fact that the subject of each charter was a fleet and that the accountings for which suit was brought below were, by agreement of the parties, fleet accountings.

The results of the operations of individual vessels having thus been inextricably merged in the overall results of the groups, it became impossible to allocate any part of the overpayments to any specific vessel. And, if these vessels had been chartered from private owners, there would have been no basis for a libel *in rem* for recovery of any of the overpayments.

II. 28 U.S.C. 1500 DOES NOT BAR JURISDICTION OF THE COURT OF CLAIMS OR OF THIS COURT

This section provides:

> The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against *the United States or* any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

This section resulted from the comprehensive revision, in 1948, of Title 28 of the U. S. Code. The predecessor section was 28 U.S.C. 260, set forth at page 3b of Appendix B, annexed hereto. The change, in the respect here material, was the insertion of the italicized words.

The purpose of the statute

Ordinarily, the pendency of one action does not bar the maintenance of another between the same parties for the same cause. *Stanton* v. *Embry,* 93 U.S. 983 (1875); *McClellan* v. *Carland,* 217 U.S. 268 (1909); *Kline* v. *Burke Construction Co.,* 260 U.S. 226 (1922); *Martin* v. *Wheatley,* 62 F. Supp. 104 (D.C. W.D. Ark., 1945); *Paluchowska* v. *United States Lines Co., Inc.,* 93 F. Supp. 751 (D.C. S.D.N.Y., 1950). Section 260 was intended to bar a suit in the Court of Claims only where another suit was pending elsewhere for the same relief against a person who was acting under authority of the United States and where a judgment in the latter case would not be *res judicata* as to the United States.

This Court, in *Matson Navigation Co.* v. *United States,* 284 U.S. 352 (1932), examined the legislative history of the original enactment and came to this conclusion. There the Court of Claims had dismissed a suit against the United States upon a claim arising out of transactions with the United States Shipping Board because the petitioner had brought separate suits against the United States in the District Court upon the same claim. This Court held that, since the purpose of section 260 was to require an election only where *res judicata* would not result, the dismissal under section 260 was improper. The Court said at pages 355-356:

> But the declared purpose of the section (originally enacted as § 8 of the Act of June 25, 1868, 15 Stat. at L. 77, chap. 71, U.S.C. title 28, § 260) was only to require an election between a suit in the Court of Claims and one brought in another court against an agent of the Government, in which the judgment would not be res adjudicata in the suit pending in the Court of Claims (Statement of Senator Edmunds, Chairman of the Judiciary Committee, in reporting the bill to the Senate, Cong. Globe, 40th Cong. 2d Sess. 1868, p. 2769).

The instant suits below and the libels in the District Court were all brought against the United States. A decision in either the District Court or the Court of Claims would be binding as *res judicata* on the other court and would dispose of the claim. Under the language of the old section 260 and the *Matson* decision, the pendency of the District Court suits would not oust the Court of Claims or this Court of jurisdiction in the instant cases. And the same result must obtain under section 1500 unless Congress intended, by the 1948

revision, to change the purpose and effect of section 260 and to overrule the *Matson* case.

It is clear that no change in purpose was intended and that the change in language which seems to give the section a new effect, was wholly inadvertent.

The legislative intent to effect no change in section 260

The legislative history of the 1948 revision makes it abundantly clear that substantive changes of a controversial character were deliberately avoided in the preparation of the revision. (See Appendix B, pages 3b-4b, for relevant excerpts from the legislative history.)

In the hearing before Subcommittee No. 1 of the House Judiciary Committee, Eugene J. Keogh, who was Chairman of the House Committee on Revision of the Laws, testified as follows (1948 U.S. Code Congressional Service, Special Pamphlet on Title 28, p. 1950):

> But, further, we proceeded upon the hypothesis that since that was primarly a restatement of existing law, we should not endanger its accomplishment by the inclusion in the work of any highly controversial changes in law.

Had it been intended to overrule the *Matson* holding, no one could reasonably suggest that such a change was not controversial. It would constitute a drastic modification of existing law, settled by this Court, resulting in serious prejudice to litigants, uncertain of the proper forum in which to prosecute their claims and unable to preserve their rights by protective suits. Such a change, therefore, was the very kind of change the revisers were seeking to avoid.

Ann Arbor Tp. v. *United States,* 93 F. Supp. 341 (D.C. E.D. Mich., 1950) concerned an analogous prob-

lem of jurisdiction under the Tucker Act. Reviewing the legislative history, the court rejected the argument that the 1948 revision of Title 28 had enlarged that jurisdiction, saying, at page 343:

> The framers of the revised statute adopted a policy, carefully followed by them, to "avoid wherever possible and whenever possible the adoption in our revison of what might be described as controversial substantive changes of law." (Page 381 of History.)

Moreover, the revisers were meticulously careful to have their notes explain in each case the kind of change that was being made and, if of substance, to point out in some detail the language, reason, and purpose of the change. For illustrations selected at random, see 28 U.S.C. 1359, 1493. Thus, Charles J. Zinn, Law Revision Counsel, House Judiciary Committee, stated in the hearing before Subcommittee No. 1 (1948 U. S. Code Congressional Service, Special Pamphlet on Title 28, p. 1981):

> It is clearly indicated in each of those revisers' notes whether any change was intended so that merely because we have changed the language—we have changed the language to get a uniform style, to avoid awkward expression, to state a thing more concisely and succinctly—but a mere change in language will not be interpreted as an intent to change the law unless there is some other clear evidence of an intent to change the law.

The authoritative weight to be given the revisers' notes is well recognized. They have been relied upon to determine that a substantive change was intended as well as that it was not. Illustrative of the former is *United States* v. *National City Lines*, 337 U.S. 78

(1948); of the latter is *Adamowski* v. *Bard,* 193 F. 2d 578, 581 (C.A. 3, 1952), certiorari denied, 343 U.S. 906, in which it was said:

> The Notes are authoritative in interpreting Title 28. See United States v. National City Lines, 337 U.S. 78, 81, 69 S. Ct. 955, 93 L. Ed. 1226. We conclude, therefore, that we are justified in presently giving to the sections the meanings which their predecessors had on January 20, 1944.

In *Affronti* v. *United States,* 350 U.S. 79 (1955) this Court had before it a question arising from the 1948 revision of Title 18. The Court, commenting on the revisers' explanation that certain words were omitted from section 3651 as unnecessary, said:

> The Revisers' Notes were used by Congress as a full explanation of all changes made in the text of the existing law. It is unlikely, therefore, that Congress intended the phrase as it appears in the present section to have a different meaning than the phrase had prior to the revision.

The revisers' notes to section 1500 disclose nothing in the nature of a substantive change in this section. They state merely that:

> Words "or in the Supreme Court on appeal therefrom" were omitted as unnecessary.
>
> Changes were made in phraseology. 80th Cong. H. Rept. No. 308.

It is clear therefore that no substantive change in section 1500 was intended and that the section was enacted by the Congress upon the premise that no substantive change was in fact being made. Had it been intended to overrule the holding in the *Matson* case, the revisers would unquestionably have adhered to

their announced practice of appending a note explaining that that was the purpose of the change. But no such explanation appears.

In statutory revision and consolidation there is a strong presumption against change in pre-existing law, absent a clearly expressed intent to make the change. *United States* v. *Ryder,* 110 U.S. 308, 312 (1883); *Ruth* v. *Eagle-Picher Company,* 225 F. 2d 572, 575 (C.A. 10, 1955); *Gulf Research & Dev. Co.* v. *Schlumberger Well Sur. Corp.,* 92 F. Supp. 16, 18 (D.C. S.D. Cal., 1950), mandamus den., 185 F. 2d 457; *Powell* v. *Utz,* 87 F. Supp. 811, 816 (D.C. E.D. Wash., 1949); *Morris* v. *Sun Oil Co.,* 88 F. Supp. 529, 530-531 (D.C. Md., 1950). Evidence of such an intent is wholly absent in the case of section 1500.

And the question now is whether inadvertent and accidental verbiage shall be given effect so as to overrule the plain legislative purpose.

Section 1500 should be construed so as to effectuate the legislative purpose

The function of a court in reading a statute is to give effect to the legislative intent. As was said in *Smythe* v. *Fiske,* 90 U.S. 47 (1874):

> A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter. *People* v. *Ins. Co.,* 15 Johns., 380; *Atkins* v. *Fiber Disintegrating Co.,* 18 Wall, 301 [85 U.S. XXI., 844]; Bac. Br., tit. Stat., 1, 2, 3, 5. The intention of the law-maker is the law.

In *Markham* v. *Cabell,* 326 U.S. 404, 409 (1945), this Court reasserted this principle when it upheld Judge Learned Hand, speaking for the Second Circuit (148

F. 2d 737), in refusing "to make a fortress of the dictionary" by reading a statute literally so as to defeat the legislative purpose. See also *Cox* v. *Roth*, 348 U.S. 207, 209 (1955).

In *Gulf Research & Dev. Co.* v. *Schlumberger Well Sur. Corp., supra,* it was held that, as to whether the revision of Title 28 effected a change in existing law, the legislative intent was conclusive and that the revisers' notes, together with the evidence presented to the Congressional Committee were determinative of that intent. The court quoted from an article by Wm. W. Barron, Chief Reviser of Title 28, as reported in 8 F.R.D. 445:

> Mere changes of phraseology indicate no intent to work a change of meaning but merely an effort to state in clear and simpler terms the original meaning of the statute revised.

The court further said, at page 19:

> The hearings before the Committee clearly indicate that no change in venue statutes was contemplated by Congress except such changes as were expressly set forth in the Reviser's Notes.
>
> * * *
>
> I believe the Reviser's Notes together with the evidence presented to the Congressional Committee should be the exclusive guide to a proper interpretation and construction of the revised sections. I believe that Congress so intended.

The argument that section 1500 bars jurisdiction would, if sustained, sacrifice unquestionable legislative intent to a plainly inadvertent change in language.

CONCLUSION

In view of the highly important questions here involved, the writs of certiorari should be granted.

Respectfully submitted,

J. FRANKLIN FORT,
529 Tower Building,
Washington 5, D. C.,
Counsel for Petitioners.

KOMINERS & FORT,
ISRAEL CONVISSER,
Of Counsel.

November 21, 1956